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United States

OCTOBER TERM, 1975

No. 75-1076

HARRY A. SKYDELL AND ARNOLD DUTCHEN,
Petitioners,

vs.

ECOLOGICAL SCIENCE CORPORATION, et al.,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

HUGO L. BLACK, JR.
THOMAS H. SEYMOUR
KELLY, BLACK, BLACK & KENNY, P.A.
1409 Alfred I. duPont Building
Telephone: (305) 373-5584
Miami, Florida 33131

KOEPPEL, STARK, MARKS &
NEWMARK
1135 Alfred I. duPont Building
Miami, Florida 33131
Telephone: (305) 379-1403

Attorneys for Plaintiffs-Respondents
Carl M. Pearson, et al.

CAPITAL PRESS, INC. — 625-7663 — 525-3351

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Respondents, Carl M. Pearson, et al., the plaintiffs-appellees below* (hereinafter "plaintiffs-respondents"),

*Respondents, Ecological Science Corporation, et al., the defendants-appellees below (hereinafter "defendants-respondents"), are submitting a separate brief in opposition to the petition.

respectfully submit this brief in opposition to the petition of Harry A. Skydell and Arnold Dutchen that a writ of *certiorari* issue to review the judgment entered on October 31, 1975, by the United States Court of Appeals for the Fifth Circuit and pray that the petition be denied by this Court.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 522 F.2d 171 (5th Cir. 1975). Both this opinion and the findings of the United States District Court for the Southern District of Florida — Miami Division are printed as appendices to the petition for a writ of *certiorari*.

JURISDICTION

The judgment of the court of appeals was entered on October 31, 1975. The petition for a writ of *certiorari* was filed on or about January 28, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

The "Questions Presented" as stated by the petitioners do not fairly arise from the record below. In a separate brief, the defendants-respondents will respond to the "questions" the petitioners contend are presented by the record in this action. This brief by plaintiffs-respondents

will respond only to the petitioners' contentions attacking the integrity of the settlement and the events and negotiations preceding the settlement.

I

Whether the writ of *certiorari* should be denied because petitioners are seeking to have this Court review the evidence concerning the settlement of this action and inferences drawn from such evidence.

II

Whether the district court specifically stripped the individual plaintiffs of their status as class representatives and adjudicated that the individual plaintiffs represented only themselves and therefore Rule 23 of the Federal Rules of Civil Procedure is not applicable.

III

Whether petitioners' individual attorneys of their choice approved the terms of settlement and all material terms of the stipulation of settlement were communicated to petitioners by their individual attorneys.

STATEMENT OF THE CASE

This action is the result of the consolidation of sixteen lawsuits which were filed by various individuals, most of which, until March 13, 1973, had been on behalf of a class comprised of all persons who had purchased shares of the defendant Ecological Science Corporation ("Ecological") during the period of approximately November 27, 1967 to approximately May 26, 1971.

Prior to the district court in Miami ordering the consolidation of these sixteen actions on March 20, 1972, the petitioners and their respective New York City attorneys employed and retained the firm of Koeppel, Stark, Marks & Newmark (the "Koeppel" firm) of Miami, Florida to represent petitioners in the proceedings below. On February 4, 1972, the Koeppel firm filed a notice of appearance in Case No. 71-1928-Civ-PF as counsel of record for Skydell and in Case No. 71-1926-Civ-PF as counsel of record for Dutchen. (A. 344; 345)*. On February 17, 1972, the district court sent to all counsel of record a copy of a proposed order pertaining to the court's intention to consolidate all pending actions and to appoint the firms of Kelly, Black, Black & Kenny, P.A. (the "Kelly" firm) and Kaufman, Taylor, Kimmel & Miller as co-lead counsel for the various plaintiffs in the consolidated actions and members of the class (A. 6)

Upon receipt of a copy of the proposed order, petitioners through their New York counsel and the Koeppel

*References to the pages of the appendix on appeal in the Court of Appeals will be disignated by the prefix "A". The appendix has been filed with the Clerk for the convenience of this Court.

firm, filed with the district court various affidavits and motion papers claiming that petitioners' interests would not be adequately protected unless their Miami attorneys, the Koeppel firm, were made one of co-lead counsel. (A. 34-47)

On March 20, 1972, the district court honored these pleas of the New York counsel and entered an order consolidating all pending actions and appointing petitioners' Miami attorneys, the Koeppel firm, and the Kelly firm as co-lead counsel for all plaintiffs in the consolidated action. (A. 48-52) Thereafter these two firms cooperated in the prosecution of the consolidated action.

The order of March 20, 1972 provided in part that all pre-trial matters would be "initiated and conducted by co-lead counsel, but other counsel representing particular plaintiffs may participate in such proceedings in subordination to co-lead counsel. . . . " and that co-lead counsel should consult with "additional counsel representing specific plaintiffs under limited circumstances." By the designation of co-lead counsel, it was the obvious intention of the district court to give the Koeppel and Kelly firms control of the prosecution of the action subject to "consultation by them with additional counsel representing specific plaintiffs." (A. 51)

On March 13, 1973, after in-depth briefing and lengthy and heated oral argument, the district court ruled that the consolidated action would not be permitted to be maintained as a class action. (A. 83) Co-lead counsel for plaintiffs were of the opinion that the district court had erred. Co-lead counsel for plaintiffs then filed an interloc-

utory appeal from the district court's order. The court of appeals, however, on May 29, 1973, granted the defendants' motion to dismiss the appeal on jurisdictional grounds. (A. 106) On July 9, 1973, the court of appeals denied plaintiffs' motion for rehearing and for rehearing *en banc*. (A. 107) On October 4, 1973, co-lead counsel for plaintiffs filed a petition for a writ of *certiorari* with this Court which presented the question: "Whether or not an order granting or denying class action certification is a collateral order automatically and immediately appealable prior to final judgment on the underlying merits of the case under the holding in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949).*

Meanwhile, the district court during the course of the interlocutory appeal, proceeded apace as if the petition had never been filed. On November 16, 1973, the district court entered an order which set the date for trial of the consolidated action for March 18, 1974. (A. 108) Intensive pretrial discovery was conducted during the course of the interlocutory appeal. The discovery included the propounding and answering of numerous interrogatories, and inspection of voluminous documents; and the taking of depositions of plaintiffs and defendants throughout the United States. The district court advised all counsel of record at various hearings before the court that the action

*See Carl M. Pearson, et al., Petitioners, v. Ecological Science Corp., et al., Respondents, Docket No. 73-596, voluntarily dismissed by the parties pursuant to Rule 60(1) of the Supreme Court Rules after settlement of the action.

would not be continued for any reason (and in particular due to the pending petition before this Court) and that the trial date of the action would commence on the scheduled trial date. In view of the trial date and these pronouncements of the district court, it was apparent that the plaintiffs' petition would not be ruled on prior to the trial of the consolidated action. This conclusion was inescapable since this Court had directed counsel in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974), to file briefs concerning a petition for a writ of *certiorari* and at the same time this Court was not ruling on a petition filed in *Lupia v. Stella D'Oro Biscuit Co., Inc.*, 417 U.S. 930, 94 S.Ct. 2639, 41 L.Ed.2d 232 (1974), which raised precisely the same question as the one raised in the plaintiffs' petition in the instant action. It was clear that this Court would not rule on either the *Lupia* petition or the petition in the instant action until *Eisen* was decided.*

As is the case in most lawsuits, serious settlement negotiations commenced at the point in time where both co-lead counsel and defense counsel were getting ready to devote all of their available time to trial preparation. After approximately two months of negotiations (taking place, in the main, during recesses in the intensive discovery being conducted by plaintiffs), the defendants made a substantial settlement offer.

On January 31, 1974, co-lead counsel for plaintiffs and defense counsel entered into a stipulation of settlement

*Oral argument in *Eisen* was set for February 25, 1974. The case was not decided by this Court until May 28, 1974. The *Lupia* petition was denied on June 3, 1974.

subject to the ratification of all plaintiffs. (A. 174-181) Co-lead counsel then submitted the settlement for ratification to the only people anyone at the time would acknowledge to be co-lead counsel's clients, that is, the named plaintiffs.

Co-lead counsel on February 9, 1974, wrote to petitioners and all other named plaintiffs for their authorization to execute a definitive agreement which would incorporate the terms of the stipulation of settlement. (A. 347; 350) Copies of the letter addressed to the respective plaintiffs were forwarded to all counsel known by co-lead counsel to be interested in the litigation and proposed settlement.* With the exception of three original and intervening plaintiffs,** whom co-lead counsel agreed to treat identically with all other plaintiffs, all plaintiffs and intervenors, including Skydell and Dutchen, ratified the terms of settlement and authorized co-lead counsel in writing to proceed with the settlement and execute the definitive agreement. (A. 217; 218; 349; 352)

On February 11, 1974, petitioners countersigned their respective copies of the letters sent to them by co-lead counsel signifying their ratification of the settlement. (A. 349; 352)

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*In view of the extremely favorable terms of the proposed settlement co-lead counsel did not anticipate any objections from the individual plaintiffs or any individual counsel, who, like co-lead counsel, were interested in the recovery obtained for their clients. For this reason, the letters to the plaintiffs were sent air-mail, special delivery and the copies to any interested counsel were sent air-mail. (A. 216-217)

**Co-lead counsel subsequently received from these plaintiffs written ratification of the terms of settlement and authorization to execute the definitive agreement.

On February 22, 1974, Thomas G. Jenny moved to intervene in the district court seeking to prevent the settlement of the action and also moved to intervene in this Court asking to prosecute the petition for writ of *certiorari*. Co-lead counsel advised both the district court and this Court that they would proceed with the settlement including the dismissal of the petition, unless Jenny's motions were granted. The motions were denied. (A. 154-156; 160)

On February 26, 1974, and February 28, 1974, respectively, petitioners' New York counsel sent telegrams to co-lead counsel which were, except for the names of the attorneys, identical in language. Both telegrams stated in pertinent part: "In light of advice from my attorney . . . . regarding abandonment of class and my possible duties as class representative, I revoke my acceptance of settlement proposal pending further clarification by the Courts." (A. 153; 300)

Thereafter, the district court held a hearing on March 14, 1974, to "clarify the status of the case." (A. 157; 230) On March 15, 1974, the district court set a date of March 27, 1974, to receive evidence and hear argument with regard to whether the terms of the stipulation of settlement should be enforced. (A. 159)

An evidentiary hearing was held on March 27, 1974, with Dutchen's New York counsel, Mr. Foley, attending on behalf of petitioners. (A. 260-297) On March 28, 1974, the district court entered an order enforcing the terms of the stipulation of settlement and directing the parties and their counsel to close the settlement. (A. 166-169)

On April 4, 1974, pursuant to the district court's order of March 28, 1974, a definitive settlement agreement was executed by co-lead counsel for plaintiffs and defense counsel. Since the consolidated action was settled, an order was entered by the district court on April 4, 1974 dismissing the consolidated action with prejudice except as provided in the settlement agreement, and the petition pending before this Court was dismissed. (A. 170)

On October 31, 1975, the court of appeals affirmed the actions and orders of the district court.

ARGUMENT

Point I

The writ of *certiorari* should be denied because petitioners are seeking to have this Court review the evidence concerning the settlement of this action and inferences drawn from such evidence.

Petitioners seek to have this Court review, for a third time, the facts and circumstances surrounding the settlement of this action. This is not grounds for the granting of a writ of *certiorari* under Rule 19 of this Court.

> "Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it." *General Talking Pictures Corp. v. Western Electric Co., Inc.*, 304 U.S. 175, 178, 82 L.Ed. 1273, 1275, 58 S.Ct. 849 (1938)

Point II

The district court specifically stripped the individual plaintiffs of their status as class representatives and adjudicated that the individual plaintiffs represented only themselves and therefore Rule 23 of the Federal Rules of Civil Procedure is not applicable.

The named plaintiffs have been adjudicated just individual plaintiffs with no representative status whatsoever by the district court's order of March 13, 1973, denying their right to maintain this suit as a class action. The district court by that order specifically stripped the individual plaintiffs of their status as class representatives. Plaintiffs exhausted all remedies to retain their status but encountered a stone wall wherever they turned. The court of appeals shut the door on them. It appeared unlikely that this Court would entertain the petition for *certiorari* in the case of *Lupia v. Stella D'Oro Biscuit Co., Inc.*, 417 U.S. 930, 94 S.Ct. 2639, 41 L.Ed.2d 232 (1974), which presented exactly the same issue.

Whether or not co-lead counsel and the named plaintiffs, after all of the aforementioned frustrations of their attempts to represent the class, retained some residual fiduciary duty to the faceless members of the class to proceed to trial and appeal in any circumstances is the core question. We anticipated that we would have to face the question unless we could obtain interlocutory review of the determination against the class action. As we put it in our petition for writ of *certiorari* to this Court:

> "What interest will any named plaintiff have in appealing a decision denying the class action certification once he himself has either been paid off or has won? Acts of heroic altruism are unknown in the investor community and no public representative is a party to the suit."

We described our plight to this Court when Mr. Jenny moved to intervene on the basis that we and our clients had a fiduciary duty to the faceless members of the class to refuse any settlement and proceed to trial:

> "What are attorneys representing clients in such status to do when an acceptable offer comes? If the attorneys recommend against settlement and a result less favorable than the offer ensues, the attorneys most certainly will face an action for malpractice. On the other hand, if the attorneys recommend acceptance, other attorneys, perhaps with visions of sugar plum fees dancing in their eyes, will appear and point the finger of sell-out."

We determined on the basis of common sense and the prior orders of the district court and court of appeals, that neither we nor our clients *at that point* possessed any fiduciary duty to refuse the settlement and proceed to trial. A legal rule that any such fiduciary obligation existed, in our opinion, would require of mere men (investors at that) the altruism of angels and would torture the sacred policy of the law in favor of compromise and settlement.

The court of appeals in its decision agreed, and we respectfully submit correctly found:

> "The district court order dismissing the litigation, pursuant to the terms of the stipulation, did not prejudice the rights of individuals who were not parties to the litigation at the time of the dismissal . . . . Nothing prevents other purchasers of Ecological stock from filing suit against the defendants in this litigation to recover their individual losses." 522 F.2d at 177.

Similarly, petitioners' reliance on this Court's decision in *Young v. Higbee Co.*, 324 U.S. 204, 65 S.Ct. 594, 89 L.Ed. 890 (1945) was found to be misplaced by the court of appeals.

> "Essential to the Supreme Court's opinion in *Young* was the finding that the abandonment of the appeal in that case by named plaintiffs had a direct adverse effect on the 'inseparable' interests of others not parties to the litigation, who were bound by the judgment of the lower court with no further opportunity to appeal. *Young, supra,* at 210-14, 65 S.Ct. at 598-99, 89 L.Ed. at 896-98. The holding in *Young* is inapposite here where the dismissal of the action as previously noted has no res judicata effect on the rights of individuals not parties to the litigation." 522 F.2d at 178.

Petitioners' contention that the rights of appeal of the unnamed members of the class have been prejudiced by the settlement and dismissal of this action is simply not accurate. Only the named plaintiffs' rights have been affected by the settlement and dismissal of the action. Any interested member of the class the named plaintiffs sought

to represent can still prosecute an individual action or an action as representative of the class and can appeal any adverse class action order in his own suit.

Point III

Petitioners' individual attorneys of their choice approved the terms of settlement and all material terms of the stipulation of settlement were communicated to petitioners by their individual attorneys.

Petitioners assert that "co-lead counsel obtained the consents of the petitioners to the stipulation through blatant misrepresentations by falsely implying that their attorneys had knowledge of and approved the settlement." Petitioners neglect to point out that their *individual* attorneys are one of the firms that is serving as co-lead counsel for the plaintiffs below.

On or about February 4, 1972, petitioners retained the Koeppel firm as attorneys of their choice to represent them individually. Notices of appearance were filed in the district court by the Koeppel firm in petitioners' individual cases. (A. 344; 345) Petitioners' New York counsel apparently approved and/or recommended the selection of the Koeppel firm; for prior to the consolidation by the district court of petitioners' individual actions with other pending actions, petitioners and their New York counsel inundated the district court with motions, affidavits and other papers to have the Koeppel firm appointed co-lead counsel in the consolidated action. (A. 34-47) It is clear

that the purpose of this maneuver was to have attorneys of petitioners' choice be continuously familiar with the status of the case and be in a position to protect the interests of petitioners. The appointment of the Koeppel firm as co-lead counsel at the same time dispensed with the necessity of petitioners' New York counsel participating in the prosecution of the action. The district court thereupon appointed petitioners' individual attorneys, the Koeppel firm, and the Kelly firm as co-lead counsel in the consolidated action. (A. 50)

Thereafter, on January 31, 1974, a stipulation of settlement was entered into by co-lead counsel for all plaintiffs subject to the various plaintiffs ratifying the terms of settlement and the various plaintiffs authorizing co-lead counsel to execute a definitive settlement agreement. (A. 174)

On February 9, 1974, petitioners' *individual* attorneys, the Koeppel firm, and the Kelly firm sent a letter to petitioners which included the material terms of the settlement affecting them. (A. 347; 350) On February 11, 1974, petitioners countersigned their acceptance and approval of the terms of settlement. (A. 349; 352) No consultation with petitioners' New York counsel was necessary since petitioners' Miami attorneys, the Koeppel firm, had approved the terms of settlement. A copy of the February 9th letter was forwarded to petitioners' New York counsel as a courtesy. (A. 216-217; 349; 352)

It is clear from a comparison of the February 9th letters with the terms of the stipulation of settlement that

only the parts of the stipulation of settlement which affected the individual plaintiffs were sent to the individual plaintiffs.

Furthermore, as shown above, the Koeppel firm represented petitioners individually. They had full knowledge of the terms of settlement. Accordingly, co-lead counsel communicated to petitioners all material terms of the stipulation of settlement. Petitioners' written ratification of the settlement, negotiated and approved by their own attorneys, on February 11, 1974, clearly bound them to the agreement.

CONCLUSION

For the reasons set forth above, and the reasons set forth in the brief of defendants-respondents, plaintiffs-respondents pray that the petition for a writ of *certiorari* be denied.

Respectfully submitted,

HUGO L. BLACK, JR.
THOMAS H. SEYMOUR
KELLY, BLACK, BLACK & KENNY, P.A.
1409 Alfred I. duPont Building
Miami, Florida 33131

KOEPPEL, STARK, MARKS & NEWMARK
1135 Alfred I. duPont Building
Miami, Florida 33131

Attorneys for Plaintiffs-Respondents

CERTIFICATE OF SERVICE

We hereby certify that three true and correct copies of the foregoing Brief of Plaintiffs-Respondents in Opposition to Petition for Writ of *Certiorari* was mailed this 12th day of March, 1976, to:

Miller & Summit
90 Broad Street
New York, New York 10004

Walton, Lantaff, Schroeder, Carson & Wahl
922 Alfred I. duPont Building,
Miami, Florida 33131

Bradford, Williams, McKay, Kimbrell,
Hamann & Jennings
9th Floor — Dade Federal Savings Bldg.
101 East Flagler Street
Miami, Florida 33131

Sullivan & Cromwell
48 Wall Street
New York, New York 10005

Aronovitz, Silver & Booth
908 Ainsley Building
Miami, Florida 33131

Harold P. Koenig
518 Oleander Drive
Hallandale, Florida 33009

Paul & Thomson
1314 First National Bank Building
Miami, Florida 33131

Russo, Dubin & Goldberg
600 Third Avenue 24th Floor
New York, New York 10016

Mershon, Sawyer, Johnston, Dunwody & Cole
1600 First National Bank Building
Miami, Florida 33131

Gaston, Snow and Ely Bartlett
82 Devonshire Street
Boston, Massachusetts 02109

Weintraub & Weintraub and
Richard J. Stull, Esq.
21 Northeast First Avenue
Miami, Florida

Jerome S. Wagshal, Esq.
1140 Connecticut Avenue, N.W.
Washington, D.C. 20036

George V. R. Mulligan
433 Bellagio Terrace
Los Angeles, California

Kaplan, Kilsheimer & Foley
122 East 42nd Street
New York, New York 10017

Kass, Goodkind, Wechsler & Gerstein
122 East 42nd Street
New York, New York 10017

KELLY, BLACK, BLACK & KENNY, P.A.

By /s/ THOMAS H. SEYMOUR

Thomas H. Seymour